Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JUANITA KELLY, Individually and in behalf of and as representative of the Estate of Colleen Beverly Kelly; COLLEEN BEVERLY KELLY, Estate of,

Petitioners,

v.

CITY OF HOUSTON, TEXAS; J.H. SHACKETT, Police Officer sued in his individual capacity,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Is the Fifth Circuit and other circuits' position that excessive force by police officers should be judged only by the exact moment that force is used consistent with this Court's instructions in *Tennessee v. Garner* and *Graham v. Connor* to look at the "totality of the circumstances"?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Juanita Kelly, individually and in behalf of and as representative of the Estate of Colleen Beverly Kelly, respectfully prays that the Supreme Court grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 24, 2001 and issued as mandate on August 15, 2001.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Fifth Circuit is not reported but is set out in the Appendix at A-1.

The district court's Final Judgment signed December 13, 2000 and filed December 14, 2000 is not reported but is set out in the Appendix at B-1.

The Memorandum and Recommendation upon which the district court based its Final Judgment, signed November 27, 2000, is not reported but is set out in the Appendix at C-1.

JURISDICTION

The judgment of the Court of Appeals was entered July 24, 2001 and issued as mandate on August 15, 2001.

This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1254(1) and § 2101(c).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves the Fourth Amendment to the United States Constitution set out in its entirety in the Appendix at D-1. This case also involves the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983 which is set out in its entirety in the Appendix at E-1.

STATEMENT OF THE CASE

Respondent J. H. Shackett [hereafter Officer Shackett] shot and killed Colleen Beverly Kelly [hereafter Decedent Kelly] on August 24, 1999. Decedent Kelly was unarmed and posed no threat to anyone.

Decedent Kelly was a 37 year old woman who suffered from depression and migraine headaches. She lived with her mother. On August 24, 1999, she called her treating psychiatrist, then began walking to her treating physician's office to get treatment for her migraine headache. Officer Shackett shot and killed Decedent Kelly before she was able to see her headache doctor.

The psychiatrist's office called 911 to request an ambulance. The caller specifically stated that she did not think Decedent Kelly had a gun. Decedent Kelly's mother also told Officer Shackett that Decedent Kelly did not have a gun in her possession or access to any gun. In fact, Officer Shackett admits that he did not have any information from any source that Decedent Kelly had access to a gun and/or that there were any guns in her house. Further, Officer Shackett agrees that Decedent Kelly's mother appeared to be truthful when she told him that her

daughter did **not** have access to a gun and that there were no guns in the house.

Officer Shackett did not contact any mental health professionals, nor did he request assistance from any police officer specially trained to deal with high suicide risks, although he knew that he was dealing with a suicide risk who suffered from mental problems.

Decedent Kelly was minding her own business when Officer Shackett first saw her. Officer Shackett asked her how she was doing, and she told him that it was none of his business. In fact, the only words that Decedent Kelly said prior to being shot and killed were: "It's none of your business."

Decedent Kelly continued walking – going across an open field and standing under a tree on Emnora Street. The terrain was flat and Officer Shackett could easily see her. Decedent Kelly stood under the tree for a couple of minutes where Officer Shackett claims she kept her hand in a fanny pack the entire time. Officer Shackett claims that he thought that Decedent Kelly had a weapon in her fanny pack despite the information that he had received to the contrary. He admits, however, that Decedent Kelly posed no direct threat when she first refused help and walked away.

Officer Shackett talked at Decedent Kelly in a loud voice and another officer used a PA/loud speaker, despite the fact that Officer Shackett admits that it is important to speak in a low voice to mentally ill persons. Additionally, police cars were present with their lights flashing. Firefighter/EMT Gasper Guercio reported three police units being at the scene and Decedent Kelly being

"more or less triangled in." As a result, it is unsurprising that the terrified, mentally unstable woman would not put down her fanny pack or stop walking in the face of hostile demands that she do so.

Officer Shackett and another officer both had their guns pointed at Decedent Kelly as she stood under the tree. A third officer, Sgt. Elliott, was parked next to Defendant Shackett holding a ready-to-shoot tazer gun. Strangely, Sgt. Elliott holstered his tazer gun and drew his own gun making three lethal weapons now trained at Decedent Kelly.

Decedent Kelly's hand was inside the car and within a few inches from Defendant Shackett when he shot and killed her. Defendant Shackett did not simply put Decedent Kelly's hand aside. Rather, Defendant Shackett chose to take the time to stand up, put his hand over the top of the door, and shoot Decedent Kelly while Decedent Kelly allegedly stood with her right hand shoved through the opened door. Decedent Kelly would have had ample time to shoot Defendant Shackett in the time Defendant Shackett took to stand, aim and shoot Decedent Kelly.

Officer Shackett claims to have found a stick resembling a weapon after he shot and killed Decedent Kelly. However, no one else claims to have seen the stick at the scene. Further, Decedent Kelly's mother has testified that the stick does not look like a gun or any other weapon.

Dr. James Fyfe, a nationally recognized law enforcement authority, notes that police encounters with emotionally disturbed persons (EDPs) have become a predictable aspect of urban policing, and professional standards for this activity have become well established.

Dr. Fyfe opined to a high degree of professional certainty that:

1. The manner in which the police approached and interacted with Ms. Kelly was a violation of generally accepted police custom and practice that greatly increased the likelihood that this encounter would end in unnecessary bloodshed;

2. The shooting and death of Ms. Kelly were unnecessary and in gross violation of generally accepted police custom and practice; and

3. The improper police handling of this encounter and the unnecessary shooting and death of Ms. Kelly were direct and predictable results of grossly inadequate training and supervision by the Houston Police Department.

Dr. Fyfe further concluded that it was improper for Officer Shackett to shoot Decedent Kelly, even assuming *arguendo* that it was reasonable to believe that she was carrying a gun, because Officer Shackett and other officers on the scene had not exhausted other reasonable alternatives for subduing Decedent Kelly before resorting to this most extreme measure of force.

PROCEEDINGS BELOW

The district court granted Officer Shackett's motion for summary judgment based on qualified immunity. [App. B-1; App. C-1]. The Fifth Circuit affirmed. [App. A-1].

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE CIRCUIT COURT'S LIMITATION ON EXAMINING THE LEGALITY OF DEADLY FORCE TO THE MOMENT SUCH FORCE WAS USED CIRCUMVENTS THIS COURT'S INSTRUCTIONS IN *TENNESSEE V. GARNER* AND *GRAHAM V. CONNOR* TO EXAMINE THE "TOTALITY OF THE CIRCUMSTANCES"

This Court has made it clear that the question in excessive force cases, including deadly force cases, is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure." *Tennessee v. Garner*, 471 U.S. 1, 8-9-(1985); *Graham v. Connor*, 490 U.S. 386, 396 (1989). The lower courts are instructed to look at "the facts and circumstances of each particular case," including "the severity of the crime at issue," a factor clearly established prior to the use of force. Nevertheless, the Fifth Circuit Court of Appeals, as well as the Sixth, Seventh, Eighth, Eleventh, and arguably the Fourth Circuit Courts of Appeal, would have the lower courts ignore events occurring before the actual use of force. This improperly allows police officers to escalate the use of force with impunity and utterly without fear of liability so long as the escalation leads to the force being necessary when it is actually used.

II. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE CIRCUIT COURTS ARE IN CONFLICT OVER WHETHER EXAMINING THE "TOTALITY OF THE CIRCUMSTANCES" INCLUDES EXAMINING ACTIONS WHICH OCCURRED PRIOR TO THE USE OF FORCE

The Fifth Circuit in this case, relying on *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir.), *cert. denied*, 506 U.S. 973 (1992), specifically stated that Plaintiff's evidence that " . . . the officers should have initially approached Colleen in a different manner and that, had they, they may have been able to subdue her, is irrelevant." Joining the Fifth Circuit in this view are *Drewitt v. Pratt*, 999 F.2d 774, 780 (4th Cir. 1993); *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993); *Menuel v. City of Atlanta*, 25 F.3d 990, 996-97 (11th Cir. 1994).

Other circuit courts place greater significance on officers' actions which occurred prior to the use of force. For example, the Tenth Circuit explicitly considers "whether [the officers'] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001); *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998); *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995). Similarly, the Third Circuit has expressed its " . . . disagreement with those courts which have held that analysis of 'reasonableness' under the Fourth Amendment requires excluding any evidence of events preceding the actual 'seizure.' " *Abraham v. Raso*, 183 F.3d 279 (3rd Cir. 1999). Even the

Fourth Circuit has back-pedaled from its original determination that each moment should be viewed in isolation. *See Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994) ("When all the factors are considered *in toto*, it is impossible to escape the conclusion that a man suffered a serious leg injury over a lost five dollar bill.").

III. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE CIRCUIT COURT'S DECISION SQUARELY CONFLICTS WITH LIMITATIONS PLACED ON THE USE OF DEADLY FORCE BY *TENNESSEE V. GARNER*

This Court has held that all excessive force cases must be analyzed under the Fourth Amendment and its "reasonableness" standard. *Graham v. Connor*, 490 U.S. 386 (1989). This Court has placed explicit limits on the use of deadly force:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so . . .
>
> [However] [w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has

> committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Tennessee v. Garner, 471 U.S. 1, 11-12 (1985).

The only eyewitness to the events of August 24, 1999 who was not an employee of Defendant City of Houston, Texas is Decedent Colleen Beverly Kelly, who is no longer with us in order to testify. Even so, disputed issues of material fact exist. Defendant Officer Shackett, who shot Decedent Colleen Kelly, is the only person at the scene who claims to have seen a stick (let alone a gun, which it is now firmly established Decedent Kelly never possessed). In *Bazan v. Hidalgo County*, 246 F.3d 481 (5th Cir. 2001), the circuit court acknowledged that a genuine dispute of material fact may exist where the credibility of an **interested** witness is at stake. Thus, it should not be taken as a given that a stick existed given that only Defendant Officer Shackett claims to have ever found one.

Further, the Fifth Circuit concluded that "Officer Shackett reasonably believed that Colleen had a gun." The summary judgment evidence demonstrates that Decedent Kelly's mother told Officer Shackett that Decedent Kelly did not have a gun or access to a gun less than thirty minutes before Officer Shackett shot and killed Decedent Kelly. Further, the taped conversation between the psychiatrist's office and the police dispatcher demonstrates that the psychiatrist's office did not think Decedent Kelly had a gun. The mere fact that Decedent Kelly kept her hand in a fanny pack is not sufficient to indicate

that she had a gun, or at the very least, this is a question for the jury to decide.

There is substantial evidence permitting a reasonable jury to conclude that the shooting was objectively unreasonable and that no objectively reasonable officer could have believed the shooting was lawful. It is uncontroverted that Decedent Kelly was unarmed. There is substantial evidence that Officer Shackett knew that Decedent Kelly was unarmed because he had already been given information that Decedent Kelly did not have a gun or access to a gun. Any information possessed by Officer Shackett that Decedent Kelly posed a threat to anyone involved only a threat to herself, *i.e.*, Decedent Kelly may have been feeling suicidal. An obvious fact issue exists as to whether Decedent Kelly was dangerous. *See Robinson v. City of Harvey*, 2001 U.S.Dist. LEXIS 1930 at *20-21 (N.D.Ill. Feb. 16, 2001) ("If plaintiff had no gun, then he posed no danger to Escalante or any one else. Neither do defendants contend that anyone believed plaintiff had committed a violent crime prior to Escalante shooting him. 'In essence, what we have here is a credibility question' not appropriately decided on a motion for summary judgment.") [internal citations omitted].

CONCLUSION

For the reasons stated above, Petitioner Juanita Arlene Kelly respectfully requests this Court to issue a writ of *certiorari* to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

Panel Opinion of the United States Court of Appeals for the Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20058
Summary Calendar

JUANITA KELLY, Individually and in behalf of and as representative of the Estate of Colleen Beverly Kelly;
COLLEEN BEVERLY KELLY, Estate of,

Plaintiffs-Appellants,

versus

CITY OF HOUSTON, TEXAS;
J.H. SHACKETT, Police Officer sued in his individual capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-00-CV-218

(Filed Jul. 24, 2001)

Before EMILIO M. GARZA, STEWART and PARKER, Circuit Judges.

PER CURIAM:*

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent

Juanita Kelly ("Juanita") appeals the district court's summary-judgment dismissal of her 42 U.S.C. § 1983 lawsuit, specifically, she challenges the dismissal of her excessive-force claim against Officer J.H. Shackett arising out of the shooting death of her daughter, Colleen Beverly Kelly ("Colleen"). Juanita has not adequately briefed her municipal-liability claims or her state-law claims, and those claims are therefore waived. *See Yohev v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

Juanita argues that there was a material factual dispute regarding whether the shooting was objectively unreasonable and whether Officer Shackett objectively reasonably believed Colleen had a gun which precluded summary judgment. She further contends that the district court failed to address her expert affidavit testimony that Officer Shackett handled the incident in gross violation of generally accepted police custom and policy.

A *de novo* review of the undisputed summary-judgment evidence belies her arguments. *See Guillory v. Domtar Indus., Inc.*, 95 F.3d 1320, 1326 (5th Cir. 1996). As the district court determined, the uncontroverted evidence establishes that, in light of all of the circumstances viewed at the time of the shooting, Officer Shackett's use of force was objectively reasonable and not excessive to the need. Officer Shackett reasonably believed that Colleen had a gun. He had been advised that Colleen intended to kill herself and, although the original 911 call was ambiguous, he had confirmed that she either had a

---

except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

gun or was on her way to find a gun. It is true that Juanita informed Officer Shackett shortly before the shooting that Colleen did not have a gun, but he reasonably discounted Juanita's statement in light of the fact that Juanita did not know Colleen's whereabouts or that Colleen had called her psychiatrist to threaten suicide. Moreover, Colleen behaved as though she was holding a gun inside of the fanny pack she carried. The eyewitness accounts all demonstrate, without refutation, that Colleen refused to put the fanny pack down despite all of the officers' requests and that she held, aimed, and made shooting motions with the object she carried as though she were aiming and shooting a gun directly at Officer Shackett. Juanita's expert testimony that the officers should have initially approached Colleen in a different manner and that, had they, they may have been able to subdue her, is irrelevant. *See Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992) (it is not constitutionally unreasonable to use deadly force when the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, at the moment the shooting took place). Colleen's actions clearly gave Officer Shackett reason to believe, at the moment of the shooting, that he was in imminent danger of physical harm, and his use of force in self-defense was not a constitutional violation. *See id.; see also Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Accordingly, the excessive-force claim fails, and the district court's judgment is AFFIRMED.

APPENDIX B

District Court's Final Judgment signed December 13, 2000 and filed December 14, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

JUANITA ARLENE KELLY, Individually and in behalf of and as representative of the Estate of COLLEEN BEVERLY KELLY, and ESTATE OF COLLEEN BEVERLY KELLY,	§	CIVIL ACTION H-00-0218
Plaintiffs,	§	
versus	§	
CITY OF HOUSTON, TEXAS and J.H. SHACKETT, Police Officer sued in his Individual Capacity,	§	
Defendants.	§	

FINAL JUDGMENT

(Filed Dec. 14, 2000)

1. The court adopts the memorandum and recommendation of the United States Magistrate Judge signed November 27, 2000.

2. Summary judgment is granted in favor of Defendants J.H. Shackett and the City of Houston, Texas.

3. Plaintiffs Juanita Arlene Kelly, individually and on behalf of and as representative of the Estate of Colleen Beverly Kelly, and the Estate of Colleen Beverly Kelly shall take nothing by their suit.

4. This is a final judgment.

Signed Dec. 13, 2000, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

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APPENDIX C

Memorandum and Recommendation signed November 27, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

JUANITA ARLENE KELLY, Individually and in behalf of and as representative of the Estate of COLLEEN BEVERLY KELLY, and ESTATE OF COLLEEN BEVERLY KELLY,	§	
Plaintiffs,	§	
versus	§	CIVIL ACTION H-00-0218
CITY OF HOUSTON, TEXAS and J.H. SHACKETT, Police Officer sued in his Individual Capacity,	§	
Defendants.	§	

MEMORANDUM AND RECOMMENDATION

Pending before the court is Defendants City of Houston, Texas, and Officer J.H. Shackett's Motion for Summary Judgment (#31). With Plaintiffs' state law claims having previously been dismissed, the City and Shackett now seek summary judgment on the remaining claims brought under 42 U.S.C. § 1983 by Plaintiffs Juanita Arlene Kelly, individually and on behalf of and as representative of the Estate of Colleen Beverly Kelly, and the Estate of Colleen Beverly Kelly. Having reviewed the pending motion, the submissions of the parties, the pleadings, and the applicable law, this court recommends that summary judgment be granted.

1. Background

In the summer of 1999, Colleen Beverly Kelly, age thirty-seven, was receiving treatment from two different physicians for severe depression and migraine headaches. On August 24, 1999, Colleen called the office of Dr. LaGrone, a psychiatrist, who was treating her for depression. When the call was completed, she began walking from her home to the office of Dr. Durayappah, the doctor who was treating her for migraine headaches, with whom she had made an appointment earlier in the day. Shortly after Colleen left the house, Elsa Smith, a nurse at Dr. LaGrone's office, called 911 to request that a police officer be dispatched to Colleen's residence because she was suicidal and needed medical attention. Plaintiffs submitted the following transcript of Smith's call to the dispatcher:

HPD: Houston Police – may I help you?

Elsa: Yes, my name is Elsa, and I'm with Dr. LaGrone's office. I have a patient that is suicidal and I need to have a police officer to go out there – uh – she is suicidal – I don't know if she will need an ambulance or not, but she needs to be transferred over to Spring Shadows Glen or if not to Harris County Psychiatric Center.

HPD: What's the location?

Elsa: It's uh – 2715 Lazy Spring, that's Houston, zip code is 77080.

HPD: What's the patient's name?

Elsa: Her name is Colleen Kelly.

HPD: Okay, uh, does she – what is she saying she's gonna do?

Elsa: I'm sorry?

HDP: You say she's suicidal – what is she saying she's gonna do?

Elsa: Well, she – I don't think she has a gun with her now, but she did talk to the doctor and said that she was suicidal and she has a history of that. So the doctor said to call ya'll. Her mother might be there but I don't think she could do anything about it.

HPD: This is a house?

Elsa: This is a house.

HPD: Okay, you're calling from over on Bissonnet?

Elsa: Our office – yes, ma'am.

HPD: Okay, we'll send someone out ma'am.

Shackett and other city personnel were dispatched to the home of Juanita Arlene Kelly, Colleen's mother. Upon pulling up to the house, Shackett asked the dispatcher to contact Dr. LaGrone's office to see if there was a weapon involved. According to the affidavit of the dispatcher, P.J. DuBose:

> I called the doctor's office and the nurse stated that the suspect was suicidal and the suspect was going to get a gun to kill herself. When I asked the nurse again if the suspect had a gun, the nurse said she was not sure if the suspect had a gun or was going to get a gun. When the nurse asked the suspect if she had a gun, the suspect would not answer if she had a gun.

> Thereafter, I notified Officer J.H. Shackett that the nurse said the suspect was suicidal and the suspect was going to get a gun to kill herself. The doctor's office did not know if the suspect had a gun or was going to get a gun. Thereafter, I went back on the radio and told Officer J.H. Shackett that the nurse asked the suspect if she had a gun but the suspect would not answer.

When Shackett and other officers arrived to inquire about Colleen, Juanita answered the door and advised them that she was unaware of her daughter's whereabouts. Juanita also informed them that Colleen did not own a gun, that there were no guns kept in the house, that Colleen did not otherwise have access to a gun, and that Colleen had left only five to ten minutes before the police arrived. Shackett and other officers, one of whom had a tazer gun, went to search for Colleen. Aside from Shackett requesting DuBose to contact Dr. LaGrone's office to inquire about a weapon, no officer called a mental health professional or requested the dispatcher to do so.

Shackett found Colleen several blocks from her home, walking southbound on Hollister Street. Pulling his patrol car alongside her, Shackett asked Colleen how she was doing. She replied, "What business is it of yours?" or words to that effect. According to Shackett's affidavit and deposition testimony, he noticed that Colleen's right hand was holding something inside a blue fanny pack. Suspecting that she was holding a gun, Shackett asked her to drop the fanny pack to the ground. Instead of complying with his request, Colleen continued walking south on Hollister, coming to a stop on Emnora Street. Shackett advised the dispatcher of the situation,

requested back-up, and followed Colleen in his patrol car. In his affidavit, which remains uncontroverted, Shackett describes the ensuing events:

> As the woman walked south and as I waited for backup to arrive, the woman walked east on Emnora and then stopped under a tree. The woman turned around with her right hand still in the bag and stayed under the tree. Officer Spriggs arrived at this time. We blocked all east-bound traffic. Officer Spriggs got on his public address system and advised the woman that we were there to help her and would give her a ride to the hospital. Officer Spriggs also asked the woman to put down the bag she was holding. The woman turned toward Officer Spriggs and without saying anything, shook her head back and forth telling us, "no." At this time, Sergeant Elliott arrived and pulled up alongside me. Officer Spriggs at this time advised the dispatcher that we needed one more unit to block west-bound traffic on Emnora.
>
> Officer Mitchell, volunteered to block traffic so I got on the radio and told him how to come to the scene without driving in front of the woman. Just as soon as I got through saying that, the woman started walking toward me. The woman raised the fanny pack with the right hand inside of it and the left hand holding her right wrist as if she was holding a gun. The woman also pointed her bagged right hand at me as if aiming at me.
>
> As soon as she started walking toward me, Sergeant Elliott, Officer Spriggs, and I all told the woman to stop and put down the bag. She continued to walk towards me. I repeatedly told the woman to stop and to put the bag down. The

> woman continued to jerk her hands as if she was trying to shoot a gun.
>
> When the woman got up to the left front head light, she leaned over towards me as if to shoot me in the chest. I had been trying to seek cover from the woman by using the patrol vehicle open door and by sliding down in my seat with my shoulders still on the back of the seat. When the woman leaped over and pointed the bag at my chest through the open door, I raised up out of my seat and shot her one time. I shot at the woman because I was in fear of my life and in fear of the others at the scene. I just wanted the woman to stop. I was scared. I thought she had a gun and she was sure close enough to shoot me with it.

After the shooting, upon retrieving and opening Colleen's fanny pack, Shackett found a stick, instead of a gun, inside the bag. Juanita claims that the stick does not look anything like a gun, the barrel of a gun, or any other weapon. An examination of a photograph of the stick submitted to the court, however, reveals that the shape of the stick resembles that of a pistol, such that it could be mistaken for a gun if concealed inside a cloth bag. The affidavits of several eyewitnesses, including two supervisory sergeants and two firefighters who were present at the scene, confirm Shackett's account of the events. After an investigation by the Houston Police Department, the shooting was found to be justified, and Shackett was not disciplined for the incident.

2. Analysis

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The parties seeking summary judgment bear the initial burden of informing the court of the basis for their motion and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, which they believe demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Colson v. Grohman*, 174 F.3d 498, 506 (5th Cir. 1999); *Marshall v. East Carroll Parish Hosp. Serv. Dist.*, 134 F.3d 319, 321 (5th Cir. 1998); *Wenner v. Texas Lottery Comm'n*, 123 F.3d 321, 324 (5th Cir. 1997), *cert. denied*, 523 U.S. 1073 (1998). The moving parties, however, need not negate the elements of the nonmovants' case. *See Wallace v. Texas Tech Univ.*, 80 F.3d 1042 1047 (5th Cir. 1996) (citing *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)).

Once a proper motion has been made, the nonmoving parties may not rest upon mere allegations or denials in the pleadings, but must present affirmative evidence, setting forth specific facts, to show the existence of a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 322-23; *Anderson*, 477 U.S. at 257; *Matsushita Elec. Indus. Co. v.*

Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); *Colson*, 174 F.3d at 506; *Marshall*, 134 F.3d at 321-22; *Wallace*, 80 F.3d at 1047; *Little*, 37 F.3d at 1075. All the evidence must be construed " in the light most favorable to the non-moving party without weighing the evidence, assessing its probative value, or resolving any factual disputes." *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181 (5th Cir. 1996) (citing *Lindsey v. Prive Corp.*, 987 F.2d 324, 327 n.14 (5th Cir. 1993)); *see Colson*, 174 F.3d at 506; *Marshall*, 134 F.3d at 321; *Messer v. Meno*, 130 F.3d 130, 134 (5th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1999); *Hart v. O'Brien*, 127 F.3d 424, 435 (5th Cir. 1997), *cert. denied*, 525 U.S. 1103 (1999); *Songbyrd, Inc. v. Bearsville Records, Inc.*, 104 F.3d 773, 776 (5th Cir. 1997). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255; *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49 n.5 (1990); *see Marshall*, 134 F.3d at 321. Nonetheless, " 'only *reasonable* inferences can be drawn from the evidence in favor of the nonmoving party.' " *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 469 n.14 (1992) (emphasis in original) (quoting *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1012 (2d Cir. 1989)). "If the [nonmoving party's] theory is . . . senseless, no reasonable jury could find in its favor, and summary judgment should be granted." *Id.* at 468-69.

The nonmovants' burden is not satisfied by "some metaphysical doubt as to material facts," conclusory allegations, unsubstantiated assertions, speculation, the mere existence of some alleged factual dispute, or "only a scintilla of evidence." *Little*, 37 F.3d at 1075; *see Hart*, 127 F.3d at 435; *Wallace*, 80 F.3d at 1047; *Douglass v. United*

Servs. Auto. Ass'n, 79 F.3d 1415, 1429 (5th Cir. 1996) (citing *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994)); *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 118 (5th Cir. 1990) (citing *Anderson*, 477 U.S. at 247-48). Summary judgment is mandated if the nonmovants fail to make a showing sufficient to establish the existence of an element essential to their case on which they bear the burden of proof at trial. *See Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993); *Celotex Corp.*, 477 U.S. at 322; *Wenner*, 123 F.3d at 324. "In such a situation, there can be 'no genuine issue as to any material fact' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 322-23.

B. Claims under 42 U.S.C. § 1983

To prevail on their claims under 42 U.S.C. § 1983, Plaintiffs must prove that a person acting under the color of state law deprived Colleen Kelly of a right secured by the Constitution or laws of the United States. *See Blessing v. Freestone*, 520 U.S. 329, 340 (1997); *Daniels v. Williams*, 474 U.S. 327, 330 (1986); *Augustine v. Doe*, 740 F.2d 322, 324-25 (5th Cir. 1984). A § 1983 complainant must support her claim with specific facts demonstrating a constitutional deprivation and may not simply rely on conclusory allegations. *See Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995); *Fee v. Herndon*, 900 F.2d 804, 807 (5th Cir.), *cert. denied*, 498 U.S. 908 (1990); *Jacquez v. Procunier*, 801 F.2d 789, 793 (5th Cir. 1986); *Angel v. City of Fairfield*, 793 F.2d 737, 739 (5th Cir. 1986); *Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985).

Plaintiffs must also prove that the alleged constitutional or statutory deprivation was intentional or due to deliberate indifference – not the result of mere negligence. *See Farmer v. Brennan*, 511 U.S. 825, 828-29 (1994); *Davidson v. Cannon*, 474 U.S. 344, 348 (1986); *Daniels*, 474 U.S. at 328; *Estelle v. Gamble*, 429 U.S. 97, 105 (1976). The negligent deprivation of life, liberty, or property is not a constitutional violation. *See Campbell v. City of San Antonio*, 43 F.3d 973, 977 (5th Cir. 1995); *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir.), *cert. denied*, 506 U.S. 973 (1992); *Herrera v. Millsap*, 862 F.2d 1157, 1160 (5th Cir. 1989); *Simmons v. McElveen*, 846 F.2d 337, 339 (5th Cir. 1988); *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985). Moreover, to hold Defendants liable under § 1983, Plaintiffs must adduce facts demonstrating Defendants' participation in the alleged wrong. *See Murphy v. Kellar*, 950 F.2d 290, 292 (5th Cir. 1992); *Jacquez*, 801 F.2d at 793.

(1) Excessive Force Claims Against Shackett

Plaintiffs claim that Shackett used excessive force against Colleen in violation of her rights under the Fourth and Fourteenth Amendments. The Supreme Court has made clear that "all claims that law enforcement officials have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard rather than a substantive due process approach." *Graham v. Connors*, 490 U.S. 386, 395 (1989); *see Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998); *Harper v. Harris County*, 21 F.3d 597, 600 (5th Cir. 1994); *Mouille v. City of Live Oak*, 918 F.2d 548, 550 (5th Cir. 1990); *Hay v. City of*

Irving, 893 F.2d 796, 798 (5th Cir. 1990). "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Graham*, 490 U.S. at 395. "While it is not always clear just when minimal police interference becomes a seizure, there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (citation omitted). Thus, a deadly force complaint under § 1983 brought by a free citizen must be analyzed according to Fourth Amendment standards. *See Stroik v. Ponseti*, 35 F.3d 155, 157 (5th Cir. 1994), *cert. denied*, 514 U.S. 1064 (1995); *Reese v. Anderson*, 926 F.2d 494, 500 (5th Cir. 1991); *Drain v. Galveston County*, 999 F. Supp. 929, 933 (S.D. Tex. 1998).

To succeed on an excessive force claim arising under the Fourth Amendment, a § 1983 plaintiff "bears the burden of proving: '(1) an injury (2) which resulted directly and only from the use of force that was clearly excessive to the need and (3) the force used was objectively unreasonable.' " *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000) (quoting *Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir.), *clarified on reh'g*, 186 F.3d 633 (5th Cir. 1999)); *accord Heitschmidt v. City of Houston*, 161 F.3d 834, 839 (5th Cir. 1998); *Carter v. Fenner*, 136 F.3d 1000, 1010 (5th Cir.), *cert. denied*, 525 U.S. 1041 (1998); *Ikerd v. Blair*, 101 F.3d 430, 433-34 (5th Cir. 1996); *Fontenot v. Cormier*, 56 F.3d 669, 675 (5th Cir. 1995); *Harper*, 21 F.3d at 600. If any of the three elements fails,

Plaintiffs' claim of excessive force will not succeed. *See Huong v. City of Port Arthur*, 961 F. Supp. 1003, 1006 (E.D. Tex. 1997).

"As in other Fourth Amendment contexts, . . . the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397 (citing *Scott v. United States*, 436 U.S. 128, 137-39 (1978)); *accord Ikerd*, 101 F.3d at 430; *Stroik*, 35 F.3d at 158. "Objective reasonableness is a matter of law for the courts to decide, not a matter for the jury." *Kipps v. Callier*, 197 F.3d 765, 769 (5th Cir. 1999) (quoting *Williams*, 180 F.3d at 703). "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an office's good intentions make an objectively unreasonable use of force constitutional." *Graham*, 490 U.S. at 397 (citing *Scott*, 436 U.S. at 138). In making a determination of objective reasonableness, the court must look at the "totality of the circumstances, paying particular attention to 'whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he [was] actively resisting arrest.' " *See Stroik*, 35 F.3d at 158 (quoting *Graham*, 490 U.S. at 397 (citing *Garner*, 471 U.S. at 6-11)). "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' . . . its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others,

and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 550 (1979) (citing *Garner*, 471 U.S. at 8-9)).

"In gauging the objective reasonableness of the force used by a law enforcement officer, we must balance the amount of force used against the need for that force." *Ikerd*, 101 F.3d at 434. "[A] constitutional violation does not occur every time an officer touches someone." *Id.* " 'Not every push or shove, even if it may later seem unnecessary in the peace of the judge's chambers,' violates the Fourth Amendment." *Graham*, 490 U.S. at 396 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)). In addition, the amount of force that is constitutionally permissible must be judged by the context in which the force is deployed. *See Williams*, 180 F.3d at 703-04; *Ikerd*, 101 F.3d at 434.

The determination of whether a particular use of force was reasonable under the Fourth Amendment "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396; *accord Carter*, 136 F.3d at 1010. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97; *accord Wagner v. Bay City*, 227 F.3d 316, 321 (5th Cir. 2000) (holding that courts should be "careful not to engage in second-guessing officers in situations in which they have to make split-second, on-the-scene decisions while confronted with a

violent individual"); *Stroik*, 35 F.3d at 158. As the Supreme Court explained in *County of Sacramento v. Lewis*:

> Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to active decisively and to show restraint at the same moment, and their decisions have to be made "in haste, under pressure, and frequently without the luxury of a second chance."

523 U.S. 833, 853 (1998) (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)).

The Supreme Court has held that officers cannot resort to deadly force unless they "have probable cause . . . to believe that the suspect [has committed a felony and] poses a threat to the safety of the officers or a danger to the community if left at large." *Garner*, 471 U.S. at 6; *see Fraire*, 957 F.2d at 1278. Clearly, "[a] police officer may not seize an unarmed nondangerous suspect by shooting him dead." *Garner*, 471 U.S. at 11. Nonetheless, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id*; *see Fraire*, 957 F.2d at 1280. "Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been

given." *Garner*, 471 U.S. at 11-12. Therefore, an officer is not prevented "from using deadly force in self-defense when the officer has probable cause to believe that the suspect poses a threat of serious physical injury or death to the officer." *Fraire*, 957 F.2d at 1280. If a police officer could " 'reasonably believe that [the suspect] had retrieved a gun and was about to shoot . . . the officer [was] justified in using deadly force to defend himself and others around him' and . . . was entitled to summary judgment as a matter of law." *Stroik*, 35 F.3d at 158 (quoting *Reese*, 926 F.2d at 501).

Here, Plaintiffs assert that Colleen, who was unarmed, suffered a fatal injury as a result of Shackett's use of deadly force, which they claim was excessive and objectively unreasonable under the circumstances. Plaintiffs argue that Colleen was minding her own business, was not armed, and posed no actual threat to Shackett when she was stopped, Further, they argue:

> Defendant Shackett claims that he killed Decedent Kelly because he thought she had a gun and he feared for his life. A call was made from Dr. LaGrone's office advising the dispatcher that Decedent Kelly was suicidal and needed to be taken to a psychiatric facility. However, the caller specifically stated that she did not think Decedent Kelly had a gun.
>
> Defendant Shackett has also testified that he found a stick in Decedent Kelly's fanny pack *after* he killed her. However, Decedent Kelly's mother told Defendant Shackett less than thirty minutes before Defendant Shackett shot and killed Decedent Kelly that Decedent Kelly did not have a gun or access to a gun. Further

> Defendant Shackett admits that he had no information from any source that Decedent Kelly actually had a gun. Further, it is clear that Defendant Shackett first found the stick, if he found a stick at all, after he shot Decedent Kelly. Finally, the stick produced as evidence by Defendant Shackett does not look anything like a gun.

In contrast, according to Terry Bratton, a 24-year veteran of the HPD, and an instructor at the police academy:

> I believe that the use of force [in this case] was not excessive but reasonable under the circumstances as described therein in the documents addressed above that I reviewed. I further believe that the training provided to Officer J.H. Shackett by the City of Houston Police Department was proper and adequate. It is my opinion that the City of Houston has no official policy, practice or custom that allows its officers to use excessive force. It is my experience and opinion that if an HPD officer is found to have violated a policy, practice or custom of using excessive force, that the officer is reprimanded, suspended and-or terminated. It is my opinion that there is no persistent wide-spread practice of allowing officers to use excessive force.

The Houston Police Department's policy regarding the use of deadly force provides:

> The use of deadly force will be limited to those circumstances in which an employee reasonably believes it is necessary to protect himself or another from the imminent threat of serious bodily injury or death. Employees will consider

> their immediate surroundings and the safety of uninvolved citizens prior to using deadly force.
>
> Employees will not justify the use of deadly force by intentionally placing themselves in imminent danger (e.g., placing themselves in front of moving vehicles).
>
> Use of firearms in the following ways is prohibited:
>
> a. Firing warning shots.
>
> b. Firing at fleeing suspects who do not represent an imminent threat to the life of the officer or another.
>
> c. Firing at a suspect whose actions are only a threat to the suspect himself (e.g., attempted suicide).

The evidence is uncontroverted that the other police officers present at the scene, as well as the paramedics, saw Colleen pointing something at Shackett. Although none could see inside her fanny pack, four other police officers and one paramedic thought Colleen was holding a gun. Further, it was proper for Shackett to rely on information imparted by the dispatcher, who indicated that Colleen could be armed. *See Rogers v. Powell*, 120 F.3d 446, 456 (3d Cir. 1997); *see also Arizona v. Evans*, 514 U.S. 1, 14-16 (1995). It was also reasonable for Shackett not automatically to take the word of Juanita Kelly regarding her daughter's access to a gun. Juanita admittedly had no knowledge of Colleen's whereabouts or that she had called her psychiatrist moments before and threatened to commit suicide. Hence, from his perspective, Shackett was faced with a mentally ill woman, walking aimlessly near an elementary school, holding an object inside a fanny pack that resembled a gun, who refused to obey his

instructions or those of Officer Spriggs to stop and drop the fanny pack, and who kept advancing steadily toward him with her hand outstretched, effectively pinning him in his patrol car.

Plaintiffs seek to rely on an entry in a report from the Harris County Medical Examiner's Office indicating that Colleen's fanny pack was wrapped around her waist. This notation was apparently written by Investigator Lopez and was based on information communicated to him by Officer Brown, a homicide investigator, who, in turn, related information he had acquired from an unidentified source. Neither Lopez nor Brown was present at the scene of the shooting. It is further apparent that the fanny pack was not wrapped around Colleen's waist when her body arrived at the Medical Examiner's office, as the same report reflects that there was no clothing or personal effects on the body. Thus, this notation is a classic example of hearsay within hearsay, as neither Lopez nor Brown had personal knowledge of the subject matter of the entry. *See Rock v. Huffco Gas & Oil Co., Inc.*, 922 F.2d 272, 280 (5th Cir. 1991). Accordingly, because Plaintiffs have not shown that either level of hearsay comes within an exception to the hearsay rule, it does not constitute competent summary judgment evidence. *See id.* at 280, 283. Inadmissible hearsay is not "enough to get past the summary judgment evidence. *See id.* at 280, 283. Inadmissible hearsay is not "enough to get past the summary judgment hurdle," *Garcia v. Reeves County*, 32 F.3d 200, 204 (5th Cir. 1994); *see Rock*, 922 F.2d at 283; *see also Evans v. McClain of Ga., Inc.*, 131 F.3d 957, 962 (11th Cir. 1997); *Barhan v. Ry-Ron Inc.*, 121 F.3d 198, 202 (5th Cir. 1997); *North Am. Specialty Ins. Co. v. Myers*, 111 F.3d 1273,

1283 (6th Cir. 1997); *Thomas v. International Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995). "A third party's description of [a witness's] supposed testimony is not suitable grist for the summary judgment mill." *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990). Moreover, even if regarded as true, this allegation is not necessarily inconsistent with the eyewitnesses' testimony, as Colleen could have her hand inside the fanny pack, pointing a gun-like object at Shackett, with the fanny pack still wrapped around her waist.

Under the circumstances, Shackett's use of force comported with the Houston Police Department's deadly force policy and, more significantly, with the United States Constitution's prohibition on the use of excessive force. While x-ray vision or 20/20 hindsight would have undoubtedly led to a different result, it cannot be said that Shackett's use of force, given the situation confronting him, was objectively unreasonsable. Although alternatives may have existed with regard to approaching Colleen at the outset or in communicating with her, that does not alter the scenario that existed at the time of the shooting. *See Young*, 775 F.2d at 1352-53. Rather than refuting Shackett's account of the shooting itself, the evidence adduced by Plaintiffs is directed at proper police procedure and the manner in which Shackett stopped and confronted Colleen, suggesting that the use of force could have been avoided if he had handled the matter differently. Liability, however, does not attach under § 1983 for a police officer's failure to observe proper police procedure or to pursue other alternatives when he is faced with what he reasonably believes to be an imminent threat of serious physical harm to himself or others. *See*

Stroik, 35 F.3d at 158-59; *Fraire*, 957 F.2d at 1275-76; *Young*, 775 F.2d at 1353.

Such an approach would, in essence, impose negligence standard, which the courts have explicitly rejected in the context of claims alleging constitutional violations. *See Farmer*, 511 U.S. at 835-36; *Davidson*, 474 U.S. at 348; *Campbell*, 43 F.3d at 977; *Fraire*, 957 F.2d at 1276. "The constitutional right to be free from unreasonable seizure has never been equated by the Court with the right to be free from a negligently executed stop or arrest. There is no question about the fundamental interest in a person's own life, but it does not follow that a negligent taking of life is a constitutional deprivation." *Young*, 775 F.2d at 1353; *accord Fraire*, 957 F.2d at 1276.

In this situation, Colleen's actions and her repeated failure to respond to the officers' commands gave Shackett cause to believe that, at the time of the shooting, she posed a threat of serious physical harm or death to himself or others, making his use of deadly force objectively reasonable and not clearly excessive to the need. *See Young*, 775 F.2d at 1353 (citing *Garner*, 471 U.S. at 11-12). "[N]o right is guaranteed by federal law that one will be free from circumstances where he will be endangered by the misinterpretation of his acts." *Id.*; *see Kellough v. Bertrand*, 22 F. Supp. 2d 602, 610-11 (S.D. Tex. 1998). "[R]egardless of what had transpired up until the shooting itself, [Colleen's] movements gave [Shackett] reason to believe, at that moment, that there was a threat of physical harm." *Fraire*, 957 F.2d at 1276 (citing *Young*, 775 F.2d at 1252-53). As the Fifth Circuit recognized in *Stroik*:

> " . . . we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure."

35 F.3d at 158-59 (quoting *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir.), *cert. denied*, 504 U.S. 915 (1992)). Consequently, Plaintiffs have failed to establish their claims of excessive force under § 1983.

(2). Qualified Immunity

Moreover, assuming *arguendo*, that the use of force was excessive, Shackett is entitled to qualified immunity from Plaintiffs' § 1983 claims. Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982); *see Kipps*, 197 F.3d at 768; *Colston v. Barnhart*, 130 F.3d 96, 99 (5th Cir. 1997), *cert. denied*, 525 U.S. 1054 (1998); *Hart*, 127 F.3d at 441; *Tamez v. City of San Marcos*, 118 F.3d 1085, 1091 (5th Cir. 1997), *cert. denied*, 522 U.S. 1125 (1998). "An official acts within his discretionary authority when he performs non-ministerial acts within the boundaries of his official capacity." *Id.*; *see Cronen v. Texas Dep't of Human Servs.*,

977 F.2d 934, 939 (5th Cir. 1992). In this situation, Shackett's actions were not taken pursuant to specific orders spelled out in minute detail beforehand. *See Tamez*, 118 F.3d at 1092. Instead, "[h]is response required quick, but careful deliberation and the exercise of his judgment." *Id.* Thus, his actions fell "within the realm of discretionary decisions police officers commonly make." *Id.*

> The qualified or "good faith" immunity doctrine was established to reconcile two competing interests. One interest is the compensation of persons whose federally protected rights have been violated. Opposing this is the fear that personal liability will inhibit public officials in the discharge of their duties. Qualified immunity has therefore been recognized to protect "all but the plainly incompetent or those who knowingly violate the law."

Johnston v. City of Houston, 14 F.3d 1056, 1059 (5th Cir. 1994) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

"Whether a government official is entitled to qualified immunity 'generally turns on the "objective reasonableness of the action" assessed in light of the legal rules that were "clearly established" at the time it was taken.' " *Johnston*, 14 F.3d at 1059 (quoting *Texas Faculty Ass'n v. University of Tex. at Dallas*, 946 F.2d 379, 389 (5th Cir. 1991) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987))); *see Siegert v. Gilley*, 500 U.S. 226, 231 (1991); *Anderson*, 483 U.S. at 638; *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Harlow*, 457 U.S. at 818; *Pena v. Rivera*, 143 F.3d 895, 899-900 (5th Cir. 1998); *Tamez*, 118 F.3d at 1095 n.5; *Dunn v. Denk*, 79 F.3d 401, 403 (5th Cir. 1996). A defendant "is entitled to qualified immunity unless he violated a

constitutional right that was clearly established at the time of his conduct." *Blackwell v. Barton*, 34 F.3d 298, 302-03 (5th Cir. 1994); *see Kipps*, 197 F.3d at 768; *Harper*, 21 F.3d at 600. In considering a claim of qualified immunity, the court must make a two-step inquiry:

> First, the court must determine whether the plaintiff has alleged a violation of a clearly established constitutional right. If the plaintiff fails this step, the defendant is entitled to qualified immunity. If [he] is successful, the issue becomes the objective legal reasonableness of the defendant's conduct under the circumstances.

Baker v. Purnal, 75 F.3d 190, 198 (5th Cir. 1996) (citations and internal quotations omitted); *see Colston*, 130 F.3d at 99; *Harper*, 21 F.3d at 600; *Rankin v. Klevenhagen*, 5 F.3d 103, 105 (5th Cir. 1993). A legal right is clearly established if the contours of the right are sufficiently clear that reasonable officials would understand that what they were doing violates that right. *See Anderson*, 483 U.S. at 640; *Johnston*, 14 F.3d at 1059; *Bennett v. City of Grand Prairie*, 883 F.2d 400, 408 (5th Cir. 1989). In this instance, in 1999, Colleen Kelly had a clearly established constitutional right to be free from the use of excessive force by a police officer in the course of an arrest, investigatory stop, or other seizure. *See, e.g., Graham*, 490 U.S. at 394-95; *Harper*, 21 F.3d at 600.

" 'If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity.' " *Blackwell*, 34 F.3d at 303 (quoting *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990)); *accord Johnston*, 14 F.3d at 1059; *see Malley*,

475 U.S. at 341 (1986); *Cansu v. Rocha*, 77 F.3d 795, 806 (5th Cir. 1996). In assessing the reasonableness of a police officer's actions, the court is not to employ the "20/20 vision of hindsight." *Colston*, 130 F.3d at 99 (citing *Graham*, 490 U.S. at 396). As the Fifth Circuit observed in the context of a Fourth Amendment claim alleging wrongful arrest:

> In suits alleging illegal arrest, the qualified immunity determination turns on whether " 'a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the . . . officer [ ] possessed.' Even law enforcement officials who 'reasonably but mistakenly believe that probable cause is present' are entitled to immunity."

Babb v. Dorman, 33 F.3d 472, 477 (5th Cir. 1994) (quoting *Hunter v. Bryant*, 502 U.S. 224, 226 (1991)); *see Baker*, 75 F.3d at 198. Similarly, if a suspect's movements give an officer reasonable cause to believe that there is a threat of serious physical harm or death to himself or others, the use of deadly force is not a constitutional violation. *See Colston*, 130 F.3d at 99; *Fraire*, 957 F.2d at 1275-76; *Young*, 775 F.2d at 1353. In other words, if Shackett's conduct was objectively reasonable, he may invoke qualified immunity, even if the conduct infringed upon Colleen Kelly's constitutional rights. *See Kipps*, 197 F.3d at 769; *Gutierrez*, 139 F.3d at 445; *Pfannstiel*, 918 F.2d at 1183.

Qualified immunity is available to defendant officials in suits arising under § 1983 and is an immunity from suit, extending beyond a defense to liability to include all aspects of civil litigation, including discovery. *See Heitschmidt*, 161 F.3d at 840; *Babb*, 33 F.3d at 477; *Jacquez*,

801 F.2d at 791; *see also Mitchell*, 472 U.S. at 526. Because it is "an affirmative defense, the defendant must both plead and establish his entitlement to immunity." *Tamez*, 118 F.3d at 1091; *see Siegert*, 500 U.S. at 231; *Harlow*, 457 U.S. at 815; *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Cronen*, 977 F.2d at 939. Once an official asserts his entitlement to qualified immunity in a properly supported motion for summary judgment, however, the plaintiff bears the burden of coming forward with sufficient summary judgment evidence to sustain a determination that the official's actions violated clearly established federal law. *See Blackwell*, 34 F.3d at 301; *Salas v. Carpenter*, 980 F.2d 299, 304, 306 (5th Cir. 1992); *Bennett*, 883 F.2d at 408; *United States v. Burzynski Cancer Research Inst.*, 819 F.2d 1301, 1310 (5th Cir. 1987), *cert. denied*, 484 U.S. 1065 (1988); *Saldana v. Garza*, 684 F.2d 1159, 1163 (5th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983). Hence, to prevail, Plaintiffs must show that Shackett knew or reasonably should have known that the action he was taking within his sphere of official responsibility would violate Colleen's constitutional rights. *See Harlow*, 457 U.S. at 818; *Schultea*, 47 F.3d at 1431-32.

Qualified immunity "gives ample room for mistaken judgments" and protects "all but the plainly incompetent or those who knowingly violate the law." *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir. 1995). Government officials may receive qualified immunity "if their decision was reasonable, albeit mistaken." *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 435 (5th Cir. 1993). Thus, an "officer could make a constitutionally reasonable judgment based on a factual misperception." *Snyder v. Trepagnier*, 142 F.3d 791, 800 (5th

Cir. 1998), *cert. granted*, 525 U.S. 1098, *cert. dismissed*, 526 U.S. 1083 (1999).

Here, Shackett has provided affidavits from the dispatcher and seven eyewitnesses to the shooting, including five police officers and two firefighter paramedics. Plaintiffs have proffered no competent evidence controverting the statements of the eyewitnesses, all of whom stated that Colleen had her hand in the fanny pack, as if she were holding a gun, when she advanced toward Shackett. Plaintiffs also have not refuted the testimony that she continued to point the fanny pack at Shackett, despite repeated warnings to stop and drop it, as she came up next to his car. Under the totality of the circumstances, "the court cannot say that a reasonable officer in [Shackett's] place would not have believed that [Colleen] posed an immediate danger of serious bodily harm to [Shackett] and [others]. As a result, [Shackett's] decision to use deadly force was objectively reasonable." *Colston*, 130 F.3d at 100. Although Shackett and the other eyewitnesses were ultimately proven to be incorrect in their assessment that Colleen was holding a gun, Shackett is still entitled to qualified immunity because his belief was objectively reasonable under the circumstances. *See Snyder*, 142 F.3d at 800. Therefore, Shackett is shielded from liability for Plaintiffs' § 1983 claims under the doctrine of qualified immunity.

(3). Claims Against the City

Because Plaintiffs have failed to establish the use of excessive force or other constitutional violation, the City cannot be held liable under § 1983 for the shooting and

ultimate death of Colleen. *See Olabisiamotosho v. City of Houston*, 185 F.3d 521, 529 (5th Cir. 1999). Thus, in the absence of a viable constitutional claim, the City is entitled to summary judgment.

3. Conclusion

Plaintiffs have failed to present a cognizable claim for relief under 42 U.S.C. § 1983 against Shackett or the City of Houston. Accordingly, this court recommends that Defendants' motion for summary judgment be granted. There are no material facts in dispute, and Shackett and the City are entitled to judgment as a matter of law.

The Clerk shall send copies of the Memorandum and Recommendation to the respective parties. The parties have ten days from receipt to file specific, written objections to the Memorandum and Recommendation. *See* FED. R. CIV. P. 72. Absent plain error, the failure to file objections bars an attack on the factual findings, as well as the legal conclusions, on appeal. The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas, 77208-1010. Copies of the objections must be mailed to the opposing party and to the chambers of the magistrate judge, P.O. Box 610070, Houston, Texas 77208-0070.

SIGNED at Houston, Texas, this 27th day of November, 2000.

/s/ Marcia A. Crone
Marcia A. Crone
United States
Magistrate Judge

APPENDIX D

Fourth Amendment to the United States Constitution

AMENDMENT IV – SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon Probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX E

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other Proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the district of Columbia.

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)